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The Trouble With Expert Witnesses

Communications with experts who are not retained may be protected by work product doctrine or disqualification

By ELLEN R. PECK
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Twins Larry and Lana Lawclerk peeked into California Joan's office early one morning. Cali greeted the twins enthusiastically. Since their admission to the bar and their employment as litigation department associates, they had worked very hard.

"Unfortunately, law school does not teach you what kinds of contacts with expert witnesses are ethical . . ." Lana chewed her lower lip and then blurted out, "We think we're in trouble already, Cali!"

"Tell me all and let's see if we can noodle out some solutions together," Cali said soothingly.

Larry started to tell Cali the background: "The firm represents Swell Hotels Inc., which has sued its big-gest rival, the Posh Hotel Group, for engaging in various business torts, including that Posh stole Swell's employees. Posh is represented by Dewey Cheathem & Howe (DCH).

About three months ago, we met with accountants Smith and Jones from Big Accounting Firm to discuss their possible retention to serve as Swell's expert witnesses concerning damages for our upcoming trial. At our one-hour meeting, we discussed Swell's action against Posh but did not give them an engagement letter, retainer or compensation.

Based upon cost considerations, Swell decided to retain Not-So-Big Accountants and we then informed Big that it was not retained. (See *Shadow Traffic Network et al., v. Superior Ct.* (Metro Traffic Control Inc.) (1994) 24 Cal.App.4th 1067, 1071-72, 29 Cal.Rptr.2d 693)

"But yesterday," Lana said, "we received the expert designation from Posh's attorneys, DCH, designating Smith and Jones, the same two accountants we spoke to, as Posh's experts on damages. What should we do?"

"I am assuming that your hour conversation with Smith and Jones involved confidential information communicated by the client that was disclosed to the experts because disclosure was reasonably necessary to further representation of the client's interests," Cali said. "If you can develop evidence demonstrating that confidential information was imparted to Smith and Jones, your consultation with these experts would have been within the ambit of the attorney-client privilege."

"But I thought all communications with experts were non-privileged," Larry said.

"No," Cali responded. "Only after designation of the expert does the transmitted information cease to be confidential. The decision to use the expert as a witness manifests the client's consent to disclosure of the information. (*Shadow*, supra, 24 Cal.App.4th at p. 1067, 1078-1079.)

"Your communications with the experts are also protected by the work product doctrine (CCP, §2018), which protects confidential communications even if those communications did not result in retention of the potential expert, provided that if you assert the privilege, you had a reasonable expectation of the communications' confidentiality. (*Shadow*, supra, 24 Cal.App.4th at p. 1080, 29 Cal.Rptr.2d 693.) The work product doctrine also protects communications with retained experts that counsel does not designate or decides not to call as witnesses (*Armenta v. Superior Ct.* (James Jones Company) (2002) 101 Cal.App.4th 525, 534, 124

Cal.Rptr.2d 273), as well as reports prepared by an expert as a consultant unless and until the expert is designated as a witness." (*Shadow*, supra, 24 Cal.App.4th at pp. 1067, 1079.)

"Yikes, you mean we have caused a breach of confidential information?" Lana queried, turning pale.

"No," Cali reassured them. "If the information you imparted was confidential, you may be able to protect the use of the information through disqualification of DCH. Disqualification is warranted where an attorney contacts an expert that the attorney knows has previously consulted with (but was not retained by) the opposing party if confidential information was disclosed to the expert. (*Shadow*, supra, 24 Cal.App.4th at pp. 1087-1088, 29 Cal.App.2d at p. 705.)

"In *County of Los Angeles v. Superior Court* (Hernandez) (1990) 222 Cal.App.3d 647, 271 Cal.Rptr. 698, a defendant had designated Dr. Verity as an expert witness; then withdrew the expert designation and retained Dr. Verity as a consultant. Plaintiff's counsel then contacted Dr. Verity, discussed the case, including a report he had previously prepared for the defense, and retained Dr. Verity to testify as plaintiff's expert. The court held that a party may, for tactical reasons, withdraw a previously designated expert witness, not yet deposed, and if that expert continues his or her relationship with the party as a consultant, the opposing party is barred from communicating with the expert and from retaining him or her as the opposing party's expert. The plaintiff's counsel was disqualified, since the court reasoned that the plaintiff's attorney could not separate knowledge he learned through the prohibited contact from appropriate information." (*Hernandez*, supra, 222 Cal.App. 3d at 658, 271 Cal.Rptr. at 705.)

"How do we measure whether DCH should be disqualified in this case?" asked Larry.

"*Shadow*, supra, 24 Cal.App.4th at 1083-1088 establishes a three-part test to evaluate whether disqualification of counsel is warranted for improper contacts with non-testifying consulting experts, whether retained or not:

"1. Did a party, through its attorneys, engage in a confidential communication with the consulting expert materially related to the proceedings before the court, with the expectation that such communications would remain confidential?

"2. If so, a rebuttable presumption then arises that the information has been used or disclosed in the current case. Since the purpose of this presumption is to implement the public policy of protecting confidential communications, the presumption is one affecting the burden of proof, imposing upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact (Evid.Code, §606).

"3. If this presumption is not rebutted, then disqualification is warranted where there is no other means by which the offending attorney could separate that improperly acquired knowledge from his or her preparation of the case."

"Are there any exceptions to disqualification under this test?" asked Lana.

"Yes," responded Cali. "Where an attorney shows that the expert did not obtain confidential information as a result of consultation with the opposing party (*Toyota Motor Sales v. Sup.Ct.* (Chavez) (1996) 46 Cal.App.4th 778, 782, 54 Cal.Rptr.2d 22, 24) or where the expert hired by the opposing party was not the same expert consulted by the other side and where there was a 'screening wall' in place (*Western Digital Corporation v. Superior Ct.* (AMSTRAD plc) (1998) 60 Cal.App.4th, 1471,1485-1486, 71 Cal.Rptr.2d 179)."

Cali continued, "A more recent exception has been established by *Collins v. State of California* (2004) 121 Cal. App. 4th 1112, which reversed disqualification of a law firm that had unknowingly retained an expert witness which had been retained as a consultant by an opposing party: 'Trucker brought a civil action alleging products liability against Navistar for injuries sustained when a chunk of concrete injured Trucker after flying through his big rig's windshield. (Collins, supra, 1117)

"'In 1999, Navistar's lawyers retained Dr. Clark, a leading expert on glass-plastic used in windshields, as a consultant in the action and communicated confidential information to him. A year later, Plaintiffs' lawyers retained Dr. Clark, who had forgotten that he had been retained as a consultant for Navistar, and never advised Plaintiffs' lawyers of the retention. (*Collins*, supra, pp. 1117-1119)

"'When Plaintiff's lawyers designated Dr. Clark as their expert, Navistar's counsel reminded Dr. Clark of their consultation and Dr. Clark notified Plaintiffs' counsel that he had forgotten about the Navistar consultation. Plaintiff's lawyers then told Dr. Clark they would have no contact with him until it was all sorted out by the court. (*Collins*, supra, pp. 1119-1122)

"'Where the expert has remained under the control of the moving party, and there is no evidence counsel knowingly retained the opposing party's expert or that the expert intentionally advised both sides, *Shadow's* rebuttable presumption does not apply and the moving party has the burden of proving that confiden-

tial information was disclosed by the expert to the party sought to be disqualified. (*Collins*, supra, pp. 1127-1128)

"'The court held that recusal was an inappropriate remedy and an abuse of discretion where (1) Plaintiff's lawyer was innocent of wrongdoing when it hired the expert; (2) had no prior notice of the conflict of interest minefield it had walked into; and (3) acted ethically after defense counsel informed it of the problem.'" (*Collins*, supra, pp. 1131-1132)

"We need to develop information concerning DCH's knowledge of our consultation with Smith and Jones and we have to develop information demonstrating that our one-hour consultation consisted of confidential information," Larry proposed.

"In another case," interjected Lana, "the opposing side has a wonderful expert. We want to approach that expert for a completely unrelated case. Any problems?"

"Although California appellate courts have not addressed this issue, there are two Ninth Circuit cases suggesting that contacting or engaging an opposing party's expert concurrently in an unrelated case is inappropriate," Cali said. (See *Campbell Indus. v. M/V Gemini* (9th Cir.1980) 619 F.2d 24, 27 — affirming attorney's admonishment and expert disqualification; *Erickson v. Newmar Corp*. (9th Cir. 1996) 87 F.3d 298, 303-304, re-mand to district court for the imposition of appropriate sanctions, including disqualification, and disciplinary action upon defense counsel who, before deposing the plaintiff's expert at a scheduled deposition, hired the expert to examine evidence in another case at $100 per hour.) "Therefore, as a matter of risk management, it is prudent to wait until the end of the case to retain that expert unless you have obtained opposing counsel's written permission to concurrent retention of the expert."

Lana then went over some procedures for expert contacts to ensure that she and Larry did not create circumstances that could result in disqualification of the firm:

"When first contacting experts, we should always question the potential expert about any prior contacts that the expert or the expert's firm has had with the opposing counsel to determine if there are any conflicts, before we have any further communications or disclose confidential information," Lana proposed.

"Lawyer experts are pretty good about keeping track of prior contacts. Non-lawyer experts, however, are another story. Many non-lawyer experts do not keep track of their current cases or prior contacts with lawyers. How do we deal with the risk of an expert who does not manage potential conflicts?" Larry asked.

"Notwithstanding your best efforts, sometimes an expert can forget prior engagements or be mistaken," Cali responded. "In this context, *Collins* demonstrates that ethical conduct can make the difference between disqualification and continuing on a case:

"If you find out from a third party that you have hired an expert that had previous contact with the opposing counsel, notify the opposing counsel immediately.

"Refrain from any further contact with the expert pending resolution by a court."

"Finally, if you have any discussions with an expert prior to retention, ensure that the expert understands that all communications are confidential until designation. As a matter of risk management, I recommend that you ask the expert to sign a confidentiality agreement which applies to the pre-retention and pre-designation phase of communications."

As the twins raced out to assemble information related to their side-switching experts, Cali called after them, "Expert contacts can burn you. Be careful out there!"

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Test — Legal Ethics
1 Hour MCLE Credit

1. Lawyer spent one hour consulting with a potential expert witness during which attorney-client privileged information was disclosed. The expert was not retained. Opposing counsel in the same litigation interviewed the same expert witness. Knowing that the expert had had an extensive conversation with Lawyer, Opposing Counsel hired the expert anyway. A court should disqualify Opposing Counsel, assuming that Opposing Counsel cannot rebut the presumption of confidentiality.

2. Consultations with undesignated potential expert witnesses in which attorney-client privileged information has been disclosed to the expert constitute a waiver of confidentiality.

3. All communications with experts are non-privileged.

4. Assume the same facts as in #1. Lawyer validly asserted that his communications with non-retained expert witness were protected by the work product privilege, provided that Lawyer had a reasonable expectation of confidentiality when the communications were made.

5. Lawyer retained expert, in-structed expert to prepare a report and, after receiving the report, de-cided not to designate expert. Lawyer may assert the work product doctrine and prevent disclosure of expert's report.

6. Lawyer and Counsel for another plaintiff entered into a joint prosecution agreement whereby all work product of Counsel would be deemed the work product of Lawyer and vice versa, including the retention and communications with experts. Counsel retained expert, but before the designation date decided not to call the expert as a witness. Counsel's client settled with Defendant and, as part of the settlement agreement, agreed to allow Defendant access to Counsel's expert. Lawyer may assert the work product doctrine and prevent disclosure of expert's testimony.

7. Disqualification is warranted where an attorney contacts an expert that the attorney knows has previously consulted with (but was not retained by) the opposing party regardless of whether confidential information was actually disclosed to the expert.

8. Disqualification of an attorney who knowingly contacts an expert with whom opposing counsel had had confidential communications is warranted because it is impossible to separate knowledge that the attorney learned through the prohibited contact from appropriate information.

9. A party may, for tactical reasons, withdraw a previously designated expert witness, not yet deposed and if that expert continues his or her relationship with the party as a consultant, the opposing party is not barred from communicating with the expert or from retaining him or her as the opposing party's expert.

10. Disqualification of counsel for improper contacts with non-testifying consulting experts, whether retained or not, requires demonstration that a party, through its attorneys, (1) engaged in a confidential communication with the consulting expert; (2) that the confidential information was materially related to the proceedings before the court and (3) that the attorneys had the expectation that such communications would remain confidential

11. If the party demonstrates the foregoing evidence, an irrebuttable presumption then arises that the information has been used or disclosed in the current case.

12. Even when the presumption is not rebutted, disqualification is only warranted where there is no other means by which the offending attorney could separate that improperly acquired knowledge from his or her preparation of the case.

13. If an attorney demonstrates that the expert did not obtain confidential information as a result of consultation with the opposing party, no disqualification is warranted.

14. Where the expert hired by the opposing party was not the same expert consulted by the other side and where a "screening wall" was put in place, the contacting lawyer will still be disqualified.

15. Where the expert has re-mained under the control of the moving party, and there is no evidence opposing counsel knowingly retained the moving party's expert or that the expert intentionally advised both sides, the moving party has the burden of proving that confidential information was disclosed by the expert

to the party sought to be disqualified.

16. A lawyer may prevent being disqualified where the lawyer was innocent of wrongdoing when it hired the expert and did not know that the expert had been hired by the opposing party.

17. After determining that a lawyer has innocently and mistakenly retained an expert previously retained by the other side, the lawyer need not cease contact with the expert.

18. In a California federal court action, Amy Attorney thought that Opposing Counsel's expert was very good. During a break from the expert's deposition, Amy contacted the expert and offered to retain the expert on a completely unrelated case being handled by her office. Opposing Counsel, who did not see the humor in this, moved to disqualify Amy for improperly contacting the expert. Amy has little risk of being disqualified.

19. As a matter of risk management, when first contacting a potential expert, a lawyer should always question the potential expert about any prior contacts that the expert or the expert's firm may have had with the opposing counsel.

20. As a matter of risk management, a lawyer need not educate a potential or retained expert about the necessity for confidentiality prior to designation.

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TEST #51 — The Trouble With Expert Witnesses

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